

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

RUTH K. KITETA :

for Revision of a Deficiency or for Refund of New York :
State and New York City Personal Income Taxes under :
Article 22 of the Tax Law and the Administrative Code :
of the City of New York for the Year 1993. :

DTA Nos. 816807
and 816808

In the Matter of the Petition :

of :

RUTH K. KITETA :

for Revision of a Deficiency or for Refund of New York :
State and New York City Personal Income Taxes under :
Article 22 of the Tax Law and the Administrative Code :
of the City of New York for the Year 1994. :

Petitioner Ruth K. Kiteta, 29 East 29th Street, No. 916, New York, New York 10016, filed an exception to the two orders of the Administrative Law Judge issued on February 11, 1999. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a letter brief in support of her exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed her petitions for a hearing in the Division of Tax Appeals.

FINDINGS OF FACT

We find the following facts.

Petitioner filed a request for a conciliation conference with the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS") challenging Notice of Deficiency No. L-014004033, which asserted New York personal income tax for 1993.

Petitioner also filed a request for a conciliation conference with BCMS challenging Notice of Deficiency No. L-013515068, which asserted New York personal income tax for 1994.

Conciliation conferences were held on May 21, 1998 with respect to both statutory notices.

BCMS mailed a conciliation order (CMS No. 165835) with respect to 1993 and a conciliation order (CMS No. 163040) with respect to 1994 to petitioner dated July 10, 1998.

Petitioner filed two petitions with the Division of Tax Appeals. One petition contested Notice No. L-014004033 and the other petition contested Notice No. L-013515068. These petitions were mailed by certified mail on October 17, 1998 to the Division of Tax Appeals or 99 days after the conciliation orders were mailed by BCMS.

On December 16, 1998, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition in response to both petitions pursuant to Tax Law § 170(3-a)(e) on the basis that the petitions were required to be filed within 90 days from the date of the conciliation orders.

Pursuant to 20 NYCRR 3000.9(a)(4), following the issuance of the Notices of Intent to Dismiss Petition, the parties were afforded 30 days within which to submit comments on the proposed dismissals. On January 12, 1999, the Division submitted the affidavits of Thomas J. English (“English”) and James Baisley (“Baisley”), employees of the Division, as well as a copy of the certified mailing record containing a list of the conciliation orders allegedly issued by the Division on July 10, 1998, including those issued to petitioner, Ruth Kiteta.

The affidavit of Thomas J. English, Assistant Supervisor of Tax Conferences in BCMS, sets forth the general certified mailing procedures followed in the ordinary course of business by BCMS when issuing orders. This affidavit also sets forth, in particular, that the regular procedures were followed in mailing two conciliation orders to Ruth Kiteta on July 10, 1998 using certified mail numbers Z-257570038 and Z-257570040.

The affidavit of James Baisley, Chief Processing Clerk in the Mail Processing Center of the New York State Department of Taxation and Finance, sets forth the general procedure followed by the Department’s mail room for the handling of certified mail and delivering such mail to the United States Postal Service. The Baisley affidavit is sufficient to establish that the regular procedures followed by the Mail Processing Center staff in the ordinary course of business when handling items of certified mail were, in fact, the procedures followed by the mail room in mailing two pieces of certified mail bearing certified Nos. Z-257570038 and Z-257570040 on July 10, 1998.

The Administrative Law Judge concluded that BCMS mailed two conciliation orders CMS Nos. 165835 and 163040, for the tax years 1993 and 1994, respectively, to petitioner on July 10, 1998 at petitioner’s last known address at 29 East 29th Street, #916, New York, New York

10016-7902 sustaining the notices of deficiency for 1993 and 1994. Therefore, on February 11, 1999, the Administrative Law Judge issued two Orders Dismissing Petitions on the grounds that they were not filed with the Division of Tax Appeals within 90 days after July 10, 1998 as prescribed by Tax Law § 170(3-a)(e).

OPINION

Tax Law § 170(3-a)(e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. Petitioner does not claim that her petitions were timely, and the evidence of proper mailing of the conciliation orders submitted by the Division is sufficient to establish that the conciliation orders were, in fact, issued to petitioner on July 10, 1998. A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989).

The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170[3-a][e]). Pursuant to 20 NYCRR 3000.22, both petitions were deemed filed when mailed to the Division of Tax Appeals by certified mail on October 17, 1998 or 99 days after the conciliation orders were issued. Therefore, the petitions were not timely filed and the Division of Tax Appeals lacks jurisdiction to consider the notices in this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ruth K. Kiteta is denied;
2. The orders of the Administrative Law Judge are affirmed; and

3. The petitions of Ruth K. Kiteta are dismissed.

DATED: Troy, New York
December 2, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner